for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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Resisting Arrest and Excessive Force Defenses

by Donna Lee Elm

Your client, John Doe, has been charged with Resisting Arrest. Four policemen found John Doe asleep on a bench in Encanto Park after hours, which is a misdemeanor Trespass. They woke him, telling him he was "under arrest." John Doe jumped up and ran until he came to a bridge; he leaped from its high point into the channel below, then crawled through palms and shrubs on the shore. Realizing he would be caught, he stopped. The police had been right behind him throughout and were wet, scratched and bruised, and not very happy with him.

They ordered John to hold his hands out to be cuffed. He instead asked, "What am I being arrested for?" They never answered, but one officer grabbed John's hand to slap on cuffs. John pulled his hand back. All four officers promptly jumped on him. John backed up, covering his head protectively. The police hit him with a nightstick to make him comply with extending his hands. As the pummelling continued, John was really getting hurt, so he struck back once. In the end, he had to take a tour through the Maricopa Medical Center Emergency Room before the jail would admit him. He was arrested for four counts of Resisting Arrest (Count 1 for running away, Count 2 for refusing to cooperate initially with handcuffing, Count 3 for backing away, and Count 4 for hitting back) and one misdemeanor count of Trespass.

Your initial assessment is bleak, since there were grounds for arrest, and John unquestionably failed to cooperate and comply, However, there is a popular misconception that "resisting" means just not complying with something. Perhaps this arose from Gandhi's concept of "passive resistance." But that is not the case in Resisting Arrest.

I. The Elements of Resisting Arrest

A. The Criminal Act of Resisting

A.R.S. § 13-2508 defines Resisting Arrest as:

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace

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officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another.

2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

Significantly, the statute refers to proactive, affirmative conduct: the use or threatened use of physical force. The plain language indicates that the crime only occurs if the arrestee takes some action against the officers. According to *Womack*, a 1993 case, the statute "prohibits *assaultive behavior* directed toward an arresting officer."[1]

In *Womack*, the arrestee motorcyclist sped away from a police car; the state alleged that the police were likely to be injured by their pursuit. The court defined "resist" as "to exert force in opposition; to exert oneself so as to counteract or defeat; to withstand the force or effect of." "It is the opposition of force to force. . . . There must be actual opposition or resistance" to constitute resistance. The rationale is that only conduct which "involves some substantial danger to the person" effecting arrest should be punished.

. . . there is a popular misconception that "resisting" means just not complying with something. . . . But that is not the case in Resisting Arrest.

In *Womack*, the court defined "avoid" arrest as "to depart or withdraw from; to keep away from." Hence, "mere non-submission ought not to be an offense." Moreover, "One who runs away from an arresting officer or who makes an effort to shake off the officer's detaining arm might be said to obstruct the officer physically, but this type of evasion or minor scuffling is not unusual in an arrest." The court concluded that trying to get away from police to prevent an arrest was different from the "assaultive behavior" required to constitute resisting arrest.

The state nonetheless alleged that by causing police to pursue him, Womack "created a substantial risk" of injuring them. The court distinguished between the act of the motorcyclist's fleeing and the act of the police's following as to what put the officers at any risk. "The decision to pursue and the manner of pursuit lies with the officer and not the defendant," and the officer did not have to drive in a way that placed anyone at risk.

B. The Criminal Mental State for Resisting Arrest

The crime of Resisting Arrest includes the culpable mental state of intentionality. That mental state could be negated by proof that the arrestee was instead motivated to avoid being injured.

In *State v. Gendron*, the court distinguished between an intent to prevent arrest and an intent to avoid injury.[2] This is posed as a *negation* of the mental state element, rather than an *affirmative* defense of self-defense to excessive force. A defendant claiming excessive force can prove it either way. Consequently, per *Gendron*, it is error for the trial court not to give instructions on both: (1) the self-defense rights under A.R.S. § 13-404(B); and, (2) the possibility that that issue negates the mental state element. Hence, you can attack the element of intentionality since he only intended to avoid injury.

As you can see, John Doe's run, plunge, and crawl away from the officers did not constitute Resisting. He did not create a substantial risk that they could be injured -- they put themselves at risk by how they chose to follow him. Count 1 against John Doe should fall under Womack because "the decision to pursue and the manner of pursuit" was not created by John Doe. Counts 2 and 3 should fall under the other Womack issue that

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for The Defense

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distinguishes between active, assaultive "resisting" and passive "avoiding" arrest. Failing to cooperate with handcuffing and backing away are just "avoiding" arrest. Count 3 could also fall under Gendron because John Doe was motivated by protecting himself from injury, not by intending to prevent arrest.

Count 4 (striking back when being pummelled), however, involves active resistance. Excessive force, unreasonable seizure, and perhaps unlawful arrest are the defenses.

II. Grounds Justifying Actively Resisting Arrest

A. Excessive Force

According to *Gendron*, A.R.S. § 13-404(B) "creates a limited right to resist excessive police force." A.R.S. § 13-404(B) authorizes self-defense to resist arrest when "the physical force used by the peace officer exceeds that allowed by law."

Although self-defense is classified as an affirmative defense, that does not mean the defendant has to prove it by a preponderance of the evidence.

The "physical force allowed by law" is defined in A.R.S. § 13-3881(B) as: "No unnecessary or unreasonable force shall be used in making an arrest." This is expanded in the Justification statute regarding use of physical force in law enforcement, A.R.S. § 13-409. Use of force in effecting an arrest is sanctioned only if:

1. a reasonable person would believe such force is immediately necessary to effect the arrest, and

2. the officer makes known the purpose of the arrest, and

3. a reasonable person would believe the arrest to be lawful.

Incidentally, regarding the second item in that list, A.R.S. § 13-3888 makes it mandatory that an officer inform an arrestee of the basis for the arrest: "When making an arrest without a warrant, the officer *shall* inform the person to be arrested of his authority and the cause of the arrest, unless the person . . . forcibly resists before the officer has an opportunity so to inform him." (Emphasis supplied.)

What is "unnecessary or unreasonable force" also varies according to the seriousness of the perceived crime. Arizona Courts first addressed this issue pre-statehood. In *Robertson v. Territory*, the court noted that an officer "may not use unnecessary bodily harm" when arresting only a misdemeanant.[3] This was reiterated in more recent cases: "It is considered unreasonable to inflict bodily harm to effect an arrest for a misdemeanor if there are other reasonable methods of effecting the arrest."[4] The officer's duty, then, in arresting a misdemeanant is to avoid *intentionally* inflicting bodily harm.[5] Hence when the arrest is only for a misdemeanor, officers must take additional steps to avoid inflicting bodily harm to the suspect.

B. Unreasonable Seizure

The Fourth and Fourteenth Amendments provide that persons have the right to be "secure in their persons . . . against unreasonable . . . seizures." The Supreme Court held that this specifically protects persons from excessive force used in a seizure/arrest.[6] Whether the force exerted is unreasonable depends not on when it was made, but how it was carried out. A Fourth Amendment defense to excessive force is analyzed under an "objective reasonableness" standard. This holds even when the officer is making a lawful arrest.[7]

C. Unlawfulness of the Arrest

Under A.R.S. § 13-404(B)(2), an arrestee no longer has a right to resist an unlawful arrest. However, an arrestee previously had a federal right to resist an unlawful arrest, *i.e.*, one not supported by probable cause. That right was limited by *U.S. v. Feola* (similar to Arizona's statute) which no longer justified resistance if based on unlawfulness of the arrest.[8] However, the 9th Circuit carved out an exception for instances of "bad faith, unreasonable force, or provocative conduct by the arresting officer" in *Span* and *U.S. v. Moore*.[9]

The narrow right of self-defense provided by *Moore* occurs when an officer acts outside the scope of his official duty. There exists "some residual role for the common law right [of resisting an unlawful arrest]" where the officer does not have probable cause, so "is engaged in a frolic of his own." In *State v. Ramsdell*, the court held that "The abolition of the common-law right to resist an unlawful arrest is in no way related to the citizen's right to protect himself from excessive force . . . of an overzealous police officer."[10] *Span* indicates that the

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critical triggering element is not the lack of probable cause, but the officer's provocative conduct or bad faith in trying to arrest. So, if the officer clearly had no grounds for arrest, but was gratuitously harassing a citizen, *Span* allows resistance.

As you can see, John Doe may assert defenses to Count 4 of excessive force and unreasonable seizure as long as it was unreasonable and unnecessary. That is especially true when this arrest was only for a misdemeanor. The force used was unreasonable and unnecessary, since four able-bodied officers could have arrested him given a bit more patience or use of limited force (just to grab and hold his hands). Note, too, the officers failed to inform John of the basis for arrest. However, he probably could not use the narrow defense allowed under the Span exception because the police did have probable cause to believe he was committing the crime.

Presuming that some or all of John Doe's counts survive to go to a jury, be sure to instruct the jury on the burden-shifting applied under self-defense for excessive force.

III. Burden of Proof

Although self-defense is classified as an affirmative defense, that does not mean the defendant has to prove it by a preponderance of the evidence.[11] The state's burden to prove all elements beyond a reasonable doubt goes to justification based on self-defense.[12] Consequently, "Once a defendant presents evidence sufficient to raise reasonable doubt as to whether his conduct was justified, lack of justification becomes an element of the offense which the state must establish beyond a reasonable doubt."[13] In fact, the Defense need only raise a reasonable doubt whether the defendant's conduct was justifi*able*, not justifi*ed*.[14] This applies to justification in resisting excessive force arrests, too.

The Defense initially therefore needs to produce only enough evidence to raise a reasonable doubt that the defendant's action was justifiable. Just "the slightest evidence of justification" is required for that. "The slightest evidence" refers to evidence tending to prove a hostile act against the arrestee which reasonably could cause serious bodily injury.[15]

According to *State v. Hunter*, it is fundamental error to fail to give the justification instruction when the defense meets its minimal burden; according to *Martinez*, it is reversible error.[16] Moreover, *Gendron* established that it is error to fail to instruct the jury that motivation to avoid physical injury could negate the intentionality element of Resisting Arrest.

You can meet "just the slightest evidence of justification" by the medical records and photos of John Doe's injuries. With that, lack of justification must then be proven by the state beyond a reasonable doubt as an element. That is quite a burden for the state to bear.

Resisting Arrest cases are not as bleak as they might seem.

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1. *State v. Womack*, 174 Ariz. 108, 111, 847 P.2d 609, 612 (App. 1992), *rev. denied* (1993)(emphasis supplied).

2. *State v. Gendron*, 166 Ariz. 562, 566-67, 804 P.2d 95, 99-100 (App. 1990), *rev. denied* (as to this issue)(1991).

3. 13 Ariz. 10, 108 P.217, *aff'd* 188 F.783 (1910).

4. *State v. Cadena*, 9 Ariz. App. 369, 372, 452 P.2d 534, 537 (1969); *Harding v. State*, 26 Ariz. 334, 225 P.482 (1924).

5. *Havier v. Partin*, 16 Ariz. App. 265, 267, 492 P.2d 761, 763

6. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871 (1989); *Tennessee v. Gardner*, 471 U.S. 1, 105 S.Ct. 1694 (1985).

7. *U.S. v. Span*, 970 F.2d 573, 577 n.3 (9th Cir. 1992)(citing *Graham*).

8. *See U.S. v. Feola*, 420 U.S. 671, 684, 95 S.Ct. 1255, 1263-64 (1975).

9. *Span* at 579; *U.S. v. Moore*, 483 F.2d 1361 (9th Cir. 1973).

10. 285 A.2d 399, 404 (R.I. 1971).

11. *Judd v. State*, 41 Ariz. 176, 16 P.2d 720 (1932); *Everett v. State*, 88 Ariz. 293, 296-97, 356 P.2d 394, 397 (1960).

12. *Id.*; *State v. Garcia*, 14 Ariz. 317, 320, 560 P.2d 394, 397 (1960).

13. *State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987); *State v. Denny*, 119 Ariz. 817, 560 P.2d 1226 (1977).

14. *See Spence v. Territory*, 13 Ariz. 20, 108 P.227 (1910).

15. *Walters* at 553, 54, 748 P.2d at 782-83; *State v. Wallace*, 83 Ariz. 220, 223, 319 P.2d 529, 531 (1957); *State v. Plew*, 150 Ariz. 75, 77, 722 P.2d 243, 245 (1986).

16. *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984); *State v. Martinez*, 122 Ariz. 596, 598 596 P.2d 734, 736 (App. 1979).

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Free Attorney or Free Lunch?

by Tom Klobas

We are all well aware that our office exists to provide legal representation to "indigent" persons charged with crimes. But what is "indigency"? And how is it determined?

The process of determining who is eligible for free legal representation in Maricopa County criminal courts is one of several matters currently under review by county management as part of its cost-reduction efforts. At present, court administration figures show that more than 90% of all Maricopa County felony defendants receive such representation. By comparison, that figure is 83% in Pima County, a difference which has spurred examination of the criteria used to determine who qualifies as an indigent person.

"We want to be certain we are providing representation to the poor -- not the 'free loader'."
Vernon B. Croaff,
former Maricopa County
Public Defender,
in Annual Report
September 1, 1966

Criminal Rule 6.4(a) defines "indigent" as "a person who is not financially able to employ counsel." This determination is normally made at the person's initial appearance in the proceeding. It is made by a judge or magistrate based largely upon information supplied by the defendant in a two-page questionnaire entitled "Defendant's Financial Statement."

Rule 6.4(b) requires that all information given to the court as part of its indigency determination be "under oath." The financial statement notes that the information provided is to be truthful and that any false statements may be prosecuted "under penalty of perjury." However, courts, often unsatisfied by information in the statement, will question the defendant on pertinent issues. Despite the rule's requirement, rarely is this examination done under oath.

The determination of indigency appears more an art than a science. There exists no clear standard. This is not unexpected as we are dealing with two variables: (1) the readily available wealth of a defendant, and (2) the prevailing market rate of the private bar to provide the desired or necessary representation. There is universal agreement that the term "indigent" as used here is not equivalent to being a "pauper" nor does it have the same meaning applicable in other governmental arenas.

Arizona case law on this issue is sparse. However, the Comment to Rule 6.4 provides some guidance. It specifies that the court should consider such factors as income, source of income, property owned, outstanding obligations, number and ages of any dependents, and other sources of family income. However, it also cautions that the court "should not consider the fact that a person has been released on bail or the ability of friends or relatives, not legally responsible for him, to obtain services of counsel." (We differ here from some other jurisdictions where the courts may consider bail release and family assets in determining indigency).

In *Morger v. Superior Court*, 130 Ariz. 508, 637, P.2d 310 (App. 1981), Division 2 adopted a slightly different list. Citing an Iowa case, it held that an indigency determination must ordinarily consider the "ready availability" of (1) real and personal property owned; (2) employment benefits; (3) pensions, annuities, social security and unemployment compensation; (4) inheritance; (5) number of dependents; (6) outstanding debts, and (7) seriousness of the charge. The last item is not included in the Comment to Rule 6.4 and seems an effort by the court to incorporate an assessment of the prevailing market rate for attorney services.

As indigency determination is thus normally based upon a superficial analysis of a defendant's self-reported financial situation done by an inferior court magistrate who may have little knowledge of the fees which would normally be charged by private attorneys for the needed representation, it is not surprising that paragraph (c) permits involved persons (including a prosecutor) to move for reconsideration of indigency status based upon "a material change of circumstances." For public defenders, our Arizona Supreme Court in *Knapp v. Hardy*, 111 Ariz. 107, 523, P.2d 1308, made this an obligation.

> " . . . [T]here is an obligation on the part of the public defender to bring to the court's attention, by way of a motion for reconsideration, those cases wherein there is a change which would indicate that the defendant is no longer indigent. The taxpayers should not be burdened by the defense of a person capable of providing his own counsel."
> 523 P.2d at 1311.

In this day of meager budgets and dwindling defender resources, the clear mandate expressed by *Knapp* seems rather timely. As caseloads continue to swell, we should not be reluctant to avoid representing those individuals who merely want to get a free ride and focus our energies upon those who have no alternative, the truly indigent defendant. Ω

RoUnd uP tHE UsuAl SusPEcTs

I appeal unto Caesar.
Acts 25:11

Round Up the Usual Suspects (hereinafter *Suspects*--I love it when you talk legal!) is still stuck on the Simpson trial. *Suspects* just can't get over the Yogi Berra quote, "You can observe a lot by watching." So before the good stuff, some repartee.

The Whole Truth and Nothing But the Truth

Perusing *The New Yorker*, Simpson-case devotees couldn't miss the Jeffrey Toobin piece on Judge Lance Ito. According to Toobin, Ito is a disciple of an emerging "truth school of jurisprudence." What's the "truth school"? You guessed it. The truth school emphasizes the truth over procedural rights. The difference from the same old Scalia nail-em-jail-em-execute-em philosophical bent is that this "school" also emphasizes meaningful civil remedies for police misconduct. Right.

CLE From TV?

Suspects was shafted by living too far south. No *Court TV* until year's end. But videomeisters may be able to painlessly claim CLE while channel surfing. Example, the Saturday, March 25, *Court TV* schedule included a 3-hour "In Practice" series specifically geared as CLE. The CLE programs run every Saturday morning.

CLE is governed by Arizona Supreme Court Rule 45. The Supremes, in turn, delegated the program's administration to the Board of Governors. *See Regulations 101-108.* Credit may be earned for CLE activities "where live instruction is used or mechanically recorded or reproduced material is used." *See also* Rule 101(J). Up to one-third of your CLE may be through self-study. Rule 104(B)(4)(c)(you may also carry over the excess).

If you do *Court TV* CLE (or other video presentations), simply make a record of the material's content, length of program, date viewed, and any other information that will establish that you actually performed the CLE. *Court TV* could be a painless way to earn five CLE credit hours.

In-Custody Video Project

Speaking of big brother, starting April 17, 1995, all in-custody defendants scheduled for superior court *not guilty* arraignments will be arraigned by video in Courtroom 501, Central Court Building. A "formal" written waiver may be done if practitioners want their clients "physically present." Someone from our office (Nora Greer) and an interpreter will be present in the jail courtroom. Private counsel may be present in the Courtroom 501. Concerns or questions can be answered by Gary Graham (506-1941).

Should O.J. Testify?

You make the call. You have a good-looking and reasonably articulate (okay, so he can't spell--but he wrote a book) client. He's charged with a gruesome double murder. The defense's alibi (mentioned in opening statement) was that the accused was playing golf in the dark before the murders (and who was there but him to testify about that?). But *Suspects* wonders about the downside. Does Marcia Clark (she's got to do the cross--right?) request O.J. to put the glove on? Can he refuse (this ain't testimonial, is it?)? What if it fits? How did Furman get the right size? Dagummit. Crafty devil. P.S. Clarence Thomas never talked about *Roe v. Wade*, Jimmy Hoffa is definitely dead even though it's not proven, and a certain LA detective hasn't said the N-word in 10 years. Sure.

Those Pesky Forms

Lawyer-extraordinaire Jim Haas provided *Suspects* with an impeachment gem. Apparently, Phoenix city prosecutors use a *Defense Interview Form*. (*See sample on page 7.*) The form essentially tells the arresting officer or other police personnel to get their DR's, that they can use them during the interview to refresh their memory, and that they should send a tape of the interview to the prosecutor after the interview. The form also asks the officer to *write down the key points the defense attorney questioned you about.* The form then provides a space for the officer to write down key points and notes. Discoverable? Under Rule 15, *Suspects* suspects it is. Apparently, some county attorneys are using the form. Might be worth asking about before, or better yet, after an interview has been conducted.

Also, the Form 4 filled out by arresting officers on warrantless arrests as required by *Gerstein* and progeny always has interesting information for possible inconsistent statements by police.

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DEFENSE INTERVIEW FORM

Case Name: _____ Defense Attorney: _____

Case Number: _____ Phone: _____

Violation: _____ Employee Name: _____

Date of Interview: _____ Serial #: _____

Time of Interview: _____ Employee's Work Hours/Days Off: _____

Place of Interview: _____

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1. Obtain copies of police reports reference this case and review prior to interview.
2. If any questions arise during the interview, please stop the interview and contact a prosecutor at extension 6461. After business hours, a department legal advisor may be contacted. If unable to contact legal counsel, the interview may be terminated at the discretion of the officer.
3. Below, write down key points the defense attorney questioned you about and any issues of which the prosecutor should be aware.
4. Remember that you can use the police reports at any time during your interview to refresh your memory. Do not provide copies of reports to the defense attorney.
5. After interview, please send cassette tape and this form to the City Prosecutor's Office.

LENGTH OF INTERVIEW: _____ hours, _____ minutes

KEY POINTS: _____

_____

_____

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_____

_____

(If additional space is needed, please use the back side of this form.)

80-221D New 4-86

New State Bar Opinion Prohibits Secretly Tape-Recording Lawyers (well, sort-of)

Those speedy, ethical police at the State Bar (the Committee) finally got around to issuing a revised opinion on the muddled subject of when you may record and not record (that is indeed the question). Opinion No. 95-03, issued February 16, 1995, squarely addresses the issue of whether it's proper to secretly record another lawyer.

The Committee reasons that secret tape-recording of another lawyer involves some *deceit*, since ER 8.4(d) prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation." In the Committee's view, attorneys would not normally expect that they are being recorded. The Committee further says that this conclusion comports with most other states and ABA rules. The New York County Bar Association takes exception. Their view is that it is so easy and commonplace that a person should reasonably expect the conversation may be recorded.

Now for the wiggle room. Criminal cases are a little different. While noting that it isn't faced with revisiting the issue, Opinion 90-02 (surreptitious recording to protect against perjury okay, but not approved for impeachment purposes) still seems to be good. As the Committee writes, "we note that the expectations of parties involved in criminal conduct, criminal law proceedings, or criminal investigations may be such that the deception inherent in secretly recording conversations does not arise." Say what? In other words, it's okay for the government to record everybody?

A close look at Opinion 75-13 (which the Committee also implies is still good ethics) notes these exceptions presumably are good for the goose (government) and the gander (defense lawyers and other common folk).

An attorney may secretly record when:

1) the "utterance" is itself a crime. Example: a bribe, threat or obscene phone call (some plea offers may fit into the latter).

2) to protect yourself or client from harm of perjured testimony.

3) for prosecutors dealing with informants and other miscreants, except that may not be done just for impeachment purposes.

4) it's allowed by some other statute, rule or court order.

Obviously, the Committee isn't holding stock in Sony.

Prosecutorial Misconduct

A former publico defendo, Peter A. Leander, has taken over as chair of the AACJ governmental misconduct committee. Defense lawyers who encounter governmental misconduct, e.g., grand jury and discovery abuse, should contact Peter.

Replacement Parts

DUI mavens should be aware that the City of Phoenix has been "retrofitting" its GCI's with "unknown parts." In other words, non-factory authorized or installed stuff is going into the machine. Documenting such an incident in your client's case could lead to a dismissal. For more information on this issue, telephone Christopher McBride with the City of Phoenix defender services.

Good News For Trial Junkies

In a canny testament to the resilience of the human spirit, the McGeemeister, unchained from his appellate desk, recently visited *Suspects* with words from on high. *See also the March 1995 Champion In Open Court.*

Apparently, Justice Kennedy can't help being fair. In *Tome v. U.S.* (January 1995), the Court ruled that prior consistent statements are admissible *only* if they were made before the alleged motive to fabricate or improper influence arose. Huh? *See* 801(d)(l)(B).

Tome involved the allegations of abuse by the father in a custody battle. The defense's case theory was that the child made up the allegation because she wanted to stay with the mother. After the child testified, the prosecution then dragged in witnesses to introduce statements made after the allegation. These witnesses, of course, didn't know the truth of the allegations, only that they were made. Message to jury: we believe the little girl--so should you. Conviction.

On appeal the Supreme Court reversed. The prosecution's argument was that the statements were relevant and hence only excludable on 403 grounds. But the Court said the rule means what it says--it is only to rebut recent fabrication. To serve this *narrow function the statement must be made before* the suggested charge or motivation to lie. Otherwise, as in *Tome*, the rule essentially becomes a tool to bolster testimony and not to rebut. *Tome* can be found at ____ U.S. _____, 115 S.Ct. 696, 130 L.Ed. 2d 574 (l995).

Till we meet again. Ω

LEGAL UPDATE--
Arizona Advance Reports 178 & 179

by Max Bessler,
Maricopa County Adult Probation

Death Penalty

State v. Richmond, 179 Ariz. Adv. Rep. 57 (1994)

In 1974, the defendant was sentenced to death after the trial court found aggravating factors and no statutory mitigating factors. The judge believed at the time the law did not permit his consideration of non-statutory mitigating factors. In 1978, pursuant to *State v. Watson*, 120 Ariz. 441 which held that it was unconstitutional to restrict mitigating circumstances to those enumerated by statute, the death sentence was vacated. On remand, the defendant again was sentenced to death. Although divided on the issues, the Arizona Supreme Court affirmed the death sentence in 1983. The U. S. Supreme Court subsequently directed the Arizona Supreme Court to correct a constitutional error in the defendant's second death sentence or impose a lesser sentence. That error involved the trial court considering an unconstitutionally vague aggravating factor.

The Arizona Supreme Court concluded it should conduct the reweighing of the sentencing factors rather than send it back to the trial court. This was based upon a belief that if the defendant were sentenced to death again by the trial court, the next appeal process would occur almost three decades after the crime which could be considered cruel and unusual punishment. In reweighing the factors, the Arizona Supreme Court concluded the defendant had become a changed person in prison. Based upon this review, the court reduced the sentence to life which was to be served consecutive to a prior life sentence.

State v. Vickers, 179 Ariz. Adv. Rep. 3 (1994)

The defendant was convicted of first degree murder of his cellmate. On an automatic appeal to the Arizona Supreme Court, the court addressed the issues of effective assistance of counsel and destruction of all physical evidence. Relying heavily upon the state's pre-trial motion to determine effective counsel, the court concluded that the defense attorney's "performance fell outside the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668. The court found that "there is more than a mere possibility that the outcome of the defendant's trial would have been different but for (the counsel's) errors." The court went on to conclude the destruction of the physical evidence was not the result of bad faith conduct and no basis for appeal. However, because the court found the defendant was denied effective assistance of counsel, the conviction and sentence were reversed.

In a strongly worded dissent, Justice Martone provided remarks "so that mistakes will not be repeated on retrial and so that trial judges in other cases will have some guidance on what to do when confronted by a plainly ineffective lawyer." In his opinion, when presented with undisputed evidence of ineffective assistance, a trial judge must remove counsel and substitute adequate counsel. The judge should make the appropriate record to protect against claims that he or she interfered with the defendant's choice of counsel.

Juvenile

Navajo County Juvenile Action No. 92-J-040, 179 Ariz. Adv. Rep. 13 (1994)

The juvenile was placed on Juvenile Intensive Probation Supervision (JIPS) after being found in violation of the conditions of his standard probation. As a condition of JIPS, the court ordered the juvenile to spend an additional 30 days in detention at the discretion of the probation officer. The court explained to the juvenile that if he obeyed the conditions, the probation officer would not order him to serve the additional time. If the juvenile did not obey them or did not have the proper attitude, the 30 days could be ordered at any time. The juvenile appealed this condition.

The court of appeals noted that although A.R.S. §§8-271 to 278 do not expressly authorize the juvenile court to order detention as a condition of JIPS, it may do so. The court of appeals relied upon *Pima County Juvenile Action No. J-20705-3* in which the court imposed detention as a condition of standard probation even though A.R.S. §8-241 did not specifically authorize it. The court reasoned that ordering detention can bear a reasonable relationship to possible rehabilitation of the juvenile.

However, the court of appeals held the juvenile court erred in granting the probation officer discretion to impose this condition. The power to impose or modify conditions of probation lies solely with the court. It may not be delegated to a probation officer. That part of the juvenile court's order was vacated.

(cont. on pg. 10)☞

Coconino County Juvenile Action No. J-12187, 178 Ariz. Adv. Rep. 43 (1994)

In 1991, the Juvenile Court in Coconino County adjudicated the juvenile delinquent for crimes committed in that county and placed him on probation. Subsequently that probation was revoked and the juvenile committed to the Adobe Mountain Juvenile Institution in Maricopa County. He was released on parole and returned to Coconino County. In 1994, the juvenile committed several armed robberies. He was eventually returned to Adobe Mountain where he committed another series of crimes. The Juvenile Court in Coconino County transferred the juvenile to the adult court for the offenses committed in Maricopa County. The juvenile court then ordered the case transferred to Maricopa County for trial. The juvenile appealed asserting that Coconino County was not the appropriate forum to consider his transfer to adult court.

The court of appeals upheld the juvenile court's action. The court of appeals noted that A.R.S. §8-206 provides:

> A. The venue of proceedings in the juvenile court shall be determined by the county of the residence of the child, of the county where the alleged delinquency, dependency, or incorrigibility obtains or is committed.
>
> B. Where the residence of the child and the situs of the alleged delinquency, dependency or incorrigibility are in different counties, invoking proceedings in one county shall bar proceedings in the others.

The court of appeals noted the juvenile's "residence" or "domicile" remained in Coconino County even while he was incarcerated in Maricopa County. Therefore, Coconino County was a proper venue for the delinquency petition and for hearing the motion to transfer for prosecution as an adult.

The court of appeals went on to explain that it relied upon the venue statute and not on the *Yavapai County Juvenile Court Action No. A-27789*, 140 Ariz. 7 (1984) cited by the state. By using the venue statute, it would be proper to bring proceedings for a single offense in more than one county. However, the statute requires that there may be only one proceeding and one adjudication for each offense. This would preclude any problem of double jeopardy or double punishment. Accordingly, the court of appeals observed that it is possible for a juvenile to commit offenses in different counties, the juvenile then could be treated as an adult in one county and as a juvenile in the others. "There is nothing necessarily inappropriate about this, and nothing in our law forbids it." The order transferring the juvenile to the adult court in Maricopa County was affirmed.

Arizona Department of Economic Security (DES) v. Superior Court in Maricopa County, 178 Ariz. Adv. Rep. 10 (1994)

In a contested severance proceeding, the mother properly filed objections to the completed social study. The trial court sustained the mother's objections and admitted a redacted report. It stated "this court believes it would be manifestly unjust to allow the state to prove its case and terminate fundamental rights based upon a written report over timely, specific, and proper objections." DES filed a special action contending that *Maricopa County Juvenile Action No. JS-501904*, 169 Ariz. Adv. Rep. 34 (1994) held that a social study report "as a whole is admissible, even over a given party's objections."

The court of appeals held that "due process requires that when timely, specific, and proper objections are raised to specific portions of a social study report, the state must introduce other evidence to prove its case as to those portions. The burden should not shift to the parents to disprove the report. . . . Thus, we believe *Maricopa County JS-501904* is consistent with A.R.S. §8-537(B) and *J-75482*. Therefore, we hold that in severance actions, when any party timely, specifically and properly objects to portions of a social study report, such portions of that report are not admissible into evidence. The state must prove its case with other evidence."

Miscellaneous

State v. Moerman, 179 Ariz. Adv. Rep. 35 (1994)

The defendant was convicted of carrying a weapon in a "fanny pack" designed to carry a concealed weapon. The court of appeals confirmed the conviction holding that a "fanny pack" is not a case for the purposes of A.R.S. §13-3102 (F).

(cont. on pg. 11)☞

Prior Convictions

State v. Tarango, 178 Ariz. Adv. Rep. 27 (1994)

The defendant was convicted of drug sales and two prior convictions. The applicable drug statute A.R.S. §13-3408 (B) required the defendant to serve the entire 15.75 years imposed by the court. However, the repetitive statute, A.R.S. §13-604(K), allowed the defendant to serve two-thirds of her sentence. Since the court used A.R.S. §13-3408 mandating no parole, the defendant appealed.

The court of appeals upheld the defendant's argument that she was eligible for parole after serving two-thirds of her sentence. It relied upon language in A.R.S. §13-604(K) which stated "[t]he penalties prescribed by this section shall be substituted for penalties otherwise authorized by law . . ." In reaching this conclusion, the court of appeals recognized it was departing from *State v. Behl*, 160 Ariz. 527 (Appeal, 1989). However, the court felt the statute's language was plain and unambiguous,and no construction of it was necessary.

Probation Conditions

State v. Hershberger, 178 Ariz. Adv. Rep. 3 (1994)

The defendant pled guilty to two charges of indecent exposure. He was granted probation and ordered to register as a sex offender and participate in intensive sex offender therapy. The defendant filed a Petition for Post-Conviction Relief which was denied. He then appealed asking that his plea and sentence be set aside.

The defendant offered two bases for his appeal. In the first, he contended that the trial court did not sufficiently inform him that the conditions of probation would require such intense therapy or that he could not live with his minor brother. The court of appeals noted that Ariz. R. Crim. P. 17.2 (b) and *State v. Young*, 112 Ariz. 361 (1975) require the defendant to be advised of any "special conditions regarding sentence, parole, or commutation imposed by statute." In this instance, there were none. "No statute, rule, or decision requires the court to advise a defendant of all the conditions of probation which may be imposed as a result of a guilty plea."

The defendant's second issue involved his requirement to register as a sex offender for life. The defendant maintained that his attorney provided ineffective counsel by telling him that this requirement might be dropped after a year. The defendant also claimed his attorney coached him how to lie to the judge to get him to accept the plea. Relying upon *Blackledge v. Allison*, 431 U.S. 63 (1977), the court of appeals held that these last two aspects of the defendants's claim merited a hearing. For that reason, the case was remanded.

Restitution

State v. Tackman, 179 Ariz. Adv. Rep. 9 (1994)

The defendant and his brother pled guilty to trafficking in stolen property. As part of the plea, they agreed to pay restitution not to exceed $2,000,000. The state prepared a restitution ledger totally $680,000. At the defendants' request, the trial court set a restitution hearing. Since the judge expected this hearing to be lengthy and involved, he appointed a commissioner as a special fact-finding master to conduct the hearing and report his findings to the sentencing court. The defendants requested a peremptory change of the commissioner. The trial court denied it, holding the commissioner was to act only as a fact finder and not as a judge and the challenges were inappropriate. The commissioner conducted the hearing over four days and reported his findings to the trial court. The defendant's brother objected to some of the findings which the trial court sustained. Restitution was set at $80,000. The defendants appealed challenging the trial court's ability to appoint a special master to hear the restitution hearing.

Relying upon Ariz. Const. art. VI, §24 and *Headland v. Sheldon*, 173 Ariz. 143 (1992), the court of appeals upheld the appointment. The Arizona Constitution provides that "[j]udges of the superior court may appoint court commissioner, masters, and referees in their respective counties, who shall have such powers and perform such duties as may be provided by law or rule of the supreme court." *Headland* further provides the court with "inherent power and discretion to adopt special individualized procedures designed to promote the ends of justice in each case that comes before them." The court of appeals also upheld the trial court's denial of a peremptory change of the commissioner. Ω

March Jury Trials

February 23

Cathy Hughes: Client charged with two counts of aggravated assault (dangerous) and four counts of criminal damage. Investigator M. Fusselman. Trial before Judge Bolton ended March 8 with a hung jury. Prosecutor D. Patton.

February 27

Timothy Agan: Client charged with first degree murder, aggravated robbery, and third degree burglary. Investigator J. Allard. Trial before Judge Hauser ended March 16. Defendant found guilty. Prosecutor A. Poulos.

Todd Coolidge: Client charged with aggravated assault. Investigator T. Thomas. Trial before Judge Jarrett ended March 3. Defendant found **not guilty**. Prosecutor M. Vincent.

Dennis Farrell: Client charged with aggravated assault (dangerous). Investigator R. Gissel. Trial before Judge Chornenky ended March 1. Defendant found **not guilty**. Prosecutor Clark.

Wesley Peterson: Client charged with four counts of threatening and intimidation. Trial before Judge Skelly ended March 1. Defendant found guilty. Prosecutor J. Martinez.

Randall Reece: Client charged with possession of dangerous drugs and misconduct involving a weapon. Trial before Judge DeLeon ended on March 1. Defendant found **not guilty**. Prosecutor Wolfson.

March 1

Barbara Spencer: Client charged with armed robbery. Investigator D. Erb. Trial before Judge Seidel ended March 27. Defendant found **not guilty**. Prosecutor J. Charnell.

March 2

David Goldberg: Client charged with aggravated DUI (with license revoked or suspended). Trial before Judge Sheldon ended March 6. Defendant found guilty. Prosecutor G. Smith.

Jim Lachemann: Client charged with possession of dangerous drugs (with two priors and while on release). Trial before Judge Seidel ended March 7. Defendant found guilty. Prosecutor P. Sullivan.

March 6

Sylvina Cotto: Client charged with possession of dangerous drugs. Investigator V. Dew. Trial before Judge Portley ended March 8. Defendant found **not guilty**. Prosecutor B. Brown.

Michael Hruby: Client charged with aggravated DUI (with priors). Investigator C. Yarbrough. Trial before Judge Chornenky ended March 10. Defendant found guilty. Prosecutor Doran.

March 7

Jim Haas: Client charged with aggravated assault (dangerous and while on probation). Bench trial before Judge Howe ended March 7. Defendant found guilty of aggravated assault, non-dangerous. Prosecutor Blomo.

March 8

Susan Corey: Client charged with aggravated assault (dangerous and with two priors). Trial before Judge Balkan ended March 14. Defendant found **not guilty**. Prosecutor Wendell.

Daniel Sheperd: Client charged with theft. Trial before Judge Schwartz ended March 9 with a **judgment of acquittal**. Prosecutor D. Cunanan.

March 14

Dennis Farrell: Client charged with forgery. Trial before Judge Hilliard ended March 14. Charge dismissed. Prosecutor Clark.

Steve Whelihan: Client charged with aggravated DUI (with two priors and while on probation). Investigator B. Abernethy. Trial before Judge Brown ended March 17 with a hung jury. Prosecutor M. Ainley.

March 15

Douglas Harmon: Client charged with possession of narcotic drugs. Trial before Judge Barker ended March 17. Defendant found guilty. Prosecutor M. Winter.

Paul Klapper: Client charged with aggravated assault (dangerous and with priors). Trial before Judge O'Melia ended March 21. Defendant found guilty of aggravated assault (dangerous, with one prior, and while on parole). Prosecutor K. Rapp.

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March 20

Tim Agan: Client charged with selling narcotic drugs. Trial before Judge Hauser ended March 23. Defendant found **not guilty**. Prosecutor G. McCormick.

Dennis Farrell: Client charged with aggravated assault (dangerous). Investigator D. Beever. Trial before Judge Hilliard ended March 24. Defendant found **not guilty**. Prosecutor Palmer.

Louise Stark: Client charged with armed robbery and kidnapping (both dangerous). Investigator R. Gissel. Trial before Judge Dougherty ended March 23. Defendant found **not guilty** of armed robbery; **hung jury** on kidnapping. Prosecutor Wendell.

March 21

Sylvina Cotto: Client charged with aggravated DUI. Investigator V. Dew. Trial before Judge Skelly ended March 23. Defendant found guilty. Prosecutor P. Gann.

Marie Farney: Client charged with two counts of aggravated assault. Trial before Judge Anderson ended March 23. Defendant found **not guilty** on one count; one count dismissed. Prosecutor Blomo.

March 22

Renee Ducharme: Client charged with aggravated DUI and aggravated assault (dangerous). Trial before Judge Brown ended March 27. Defendant found **not guilty**. Prosecutor Smith.

March 27

George Gaziano: Client charged with four counts of aggravated DUI. Trial before Judge Grounds ended March 29. Defendant found guilty. Prosecutor P. Gann. Ω

Bulletin Board

Speakers Bureau

Russ Born served as the defense attorney in Peoria Justice Court's mock preliminary hearing on March 30. Judge Lex Anderson conducts a mock "prelim" every year for the citizens police academy. The academy's observers believe that they are watching a real PH until the end of the session when they are told that the hearing is a dramatization.

Christopher Johns will moderate a panel discussion on minority issues at Mohave County's seminar "*Minority Issues in Criminal Law*" on May 5. Some of the other speakers at the seminar will be the Honorable Barry Schneider, Maricopa County Superior Court, and Anthony P Griffin, Esq., of Galveston, Texas.

Slade Lawson will address an American Government class at Dobson High School on March 30. He will speak on the criminal justice system and the defense perspective.

Greg Parzych and Slade Lawson talked to a 5th grade class at Erie Middle School about the "courtroom experience" on April 05. On April 07, they then conducted a tour of the courthouse for the students.

Personnel

Andy DeFusco, a trial attorney, will be leaving Group C to enter private practice in Phoenix.

Anne Merrill started as a legal secretary in Trial Group C on April 17. Ms. Merrill, who was employed as a customer service representative with Phoenix Newspapers, replaces Barbara Brown in our Mesa office.

Jody Wilkins has been hired as a legal secretary to replace Suzanne Graham. She started work in Trial Group D on April 10.

Client Clothing Closet

Judges from various courts have called us and asked that we retrieve clothing checked out from our Client Clothing Closet and then left at the courts after hearings, etc.

Please remember to promptly return clothing borrowed from our closet.

Also, the closet is in dire need of belts (people are not returning them!). If you have any that you are not using, please donate to the closet (or return those that were borrowed). Thanks. Ω

Computer Corner

This column is designed to provide simple computer tips helpful to people in the legal field. These tips are designed for WordPerfect 5.1 in DOS. If you have any suggestions that you would like to share, please contact Georgia Bohm at *for The Defense* (506-3045). If you have any problems or questions regarding the tips offered below, contact Ellen Hudak in Trial Group B (506-8331) or Georgia.

Comments -- For Your Eyes Only

The **Comment** in WordPerfect's **Text In/Out** feature (**Ctrl-F5**) allows you to add notes to yourself that show on your computer screen but do NOT appear in your printed document. This is a handy way to leave yourself a reminder or to preserve material that you may want for future use. These comments appear on your computer screen in a double-line box, such as the example below:

This is a sample paragraph from a standard document on which you might be working. As you type you remember that you want to remind yourself about something (e.g., to update the statistics listed in your document). You add your comment now.

> ***This is an example of how a "comment" will look on your computer screen. The comment may be short or long, but not more than one page.***
> ***Caveat: The "comment" feature will not work within column text.***

And then you finish the rest of your paragraph/document. The text will look something like this on your screen.

When looking at the document in **Reveal Codes**, you will see only the designation **[Comment]** for the entire box with notes. The wording of your comment will NOT be repeated in **Reveal Codes**.

When you print the document, the comment box will NOT be printed.

To create a comment,
hit **Ctrl-F5** for **Text In/Out**,
hit **4** or **C** for **Comment**,
hit **1** or **C** for **Create**,
type your comments,
hit **F7** to exit **Comment**.

To delete the comment,
look in **Reveal Codes**,
place your cursor on **[Comment]**,
hit **Delete**.

To convert the comment into text in your document,
hit **Ctrl-F5** for **Text In/Out**,
hit **4** or **C** for **Comment**,
hit **3** or **T** for **Convert to text**.
NOTE: If you have more than one comment in your text, watch where you place your cursor before converting comment to text. If the cursor is not on a particular comment, the conversion will work on the comment preceding your cursor. If no comment precedes the cursor, the conversion will affect the first comment after the cursor.

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MORE ON "COMMENTS":

This feature can convert already typed text into a comment. Say you are reviewing a document and realize that you do not want to use a particular sentence/paragraph, but you want to save it for future use or reference. Simply

Block (F12) the targeted sentence/paragraph,
hit **Ctrl-F5** for **Text In/Out**,
hit **Y** for **Yes** when asked if you want to "Create a comment?"

and the blocked text is automatically changed to a comment that looks like the earlier sample.

Paragraph Numbering

WordPerfect has a numbering system that will save you a lot of time if you ever number items in a document and then rearrange, add to, or delete from your list--it will automatically renumber your entire list.

To number your paragraphs,
hit **Shift-F5** for **Date/Outline**,
hit **5** for **Paragraph numbering**,
enter a number (1-8) for the **paragraph level** to select your numbering style,
Level **1** is a Roman numeral, e.g., **I.**
Level **2** is a Capitalized letter, e.g., **A.**
Level **3** is a Number, e.g., **1.**
Level **4** is a Small letter, e.g., **a.**
Level **5** is a Number in parentheses, e.g., **(1)**
Level **6** is a Small letter in parentheses, e.g., **(a)**
Level **7** is a Small Roman numeral with right-sided parenthesis, e.g., **i)**
Level **8** is a Small letter with right-sided parenthesis, e.g., **a)**
hit **Enter** and **F4** to **Indent** paragraph.

Repeat the above instructions for numbering each paragraph. If you later insert a new numbered paragraph, the list will renumber itself as you scroll down (OR, if you are daring and want to take the fast track, you can "rewrite" the document by hitting **Ctrl-F3** for **Screen**, and **3** for **Rewrite**).

For the really brave at heart, you can make a numbering macro that will number for you with only two key strokes (in my program, it is **Alt-N**). You could also create a macro to handle outline numbering/lettering as you indent for each section and subsection (and it does it without turning "on" the **Outline** format, which allows you a little more freedom of cursor movement within the outlined document). Your outline would follow this format:

I.
II.
A.
B.
1.
2.
a.
b.
c.
(1) etc.

But more about what a macro is, how to create one, and how to use one next month. Ω

Maricopa County Public Defender
Training Schedule

Date	Time	Title	Location
4/24/95 - 5/12/95	8:30 - 5:00	New Attorney Training	MCPD Training Fclty.
5/12/95	9:00 - 5:00	Attorney/Investigator Training: ***"What You Don't Know May Help You"*** with: Dr. Steven Pitt on Psychiatric Issues; Annabelle Hall, Esq., Mary Durand, P.I., Paulette Kasieta, P.D. Inv. Curtis Yarbrough, " " on Investigation; Steve Avilla, Esq. on Defense Issues; Diana Emery Hulick on Photography; and more*** (6 CLE hours)	Holiday Inn Crowne Plaza -- Central & Adams
06/09/95	1:30 - 5:00	Attorney Training: ***Ethics of Client Relations*** with: Cessie Alfonso, ACSW, of New Jersey and Panel Discussion: Leonard Brown, C.A. Donna Hamm, from Middle Ground Karen Kemper, Esq. Jamie McAlister, Esq. Emmet Ronan, MCPD Barbara Spencer, MCPD Diana Squires, Esq. Penny Wilrich, Esq. (3 CLE Ethics hours)	Supervisors Auditorium